Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

184 (S)

No. 10-1031

IN THE

# Supreme Court of the United States

NATIONAL CORN GROWERS ASSOCIATION, *et al.*,
*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF *AMICI CURIAE* CROPLIFE AMERICA AND AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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March 18, 2011

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## INTEREST OF *AMICI CURIAE* CROPLIFE AMERICA AND AMERICAN FARM BUREAU FEDERATION[1]

CropLife America (CropLife) is the national voice of the agricultural crop protection industry. It represents the companies that develop, manufacture, and distribute virtually all crop protection and biotechnology products used by American farmers. Many of those products are regulated by the United States Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, which establishes certain requirements for the sale and use of pesticides, and section 408 of the Federal Food, Drug, and Cosmetics Act (FFDCA), 21 U.S.C. § 346a, which governs the issuance, modification, and revocation of pesticide tolerances (i.e., maximum allowable residue limits) needed for lawful sale of raw agricultural commodities treated with particular pesticides. CropLife frequently participates as *amicus curiae* in cases, like this one, that raise significant issues under FIFRA and FFDCA § 408.

American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers. AFBF represents more than 6.2

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief. Petitioners and respondents have consented to the filing of this brief, as reflected in letters filed with the Clerk of Court.

million member families through member organizations in all fifty states and Puerto Rico. Many of the AFBF member families own and operate farms that produce the crops, livestock, and poultry that provide safe and affordable food, fuel, and fiber for Americans and a growing global population. Many of those farms use crop protection products registered under FIFRA as an essential tool for eliminating pests, weeds, and fungi that would otherwise devastate our nation's food supply.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises fundamentally important issues of administrative law warranting this Court's review. In the decision below, the D.C. Circuit erroneously applied a highly deferential standard of review to an agency's refusal to conduct a statutorily-mandated on-the-record hearing. In doing so, the D.C. Circuit took deference principles used to review policy judgments adopted through informal rulemaking and improperly extended those principles to review of a profoundly different question—*i.e.*, whether an agency properly refused to conduct formal rulemaking that Congress required as an essential check on the agency's authority. According deference to such an agency refusal is incompatible with administrative summary judgment standards. It is also flatly inconsistent with this Court's decision upholding such procedures, with Congress's purpose in requiring on-the-record hearings, and with the historical justifications offered for agency use of summary judgment procedures.

The decision below seeks to promote agency convenience and efficiency in an area where Congress has consciously struck a different balance. Despite

the pronounced trend toward greater use of informal rulemaking ushered in by this Court's seminal decision in *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973), Congress has adhered to its initial decision nearly 75 years ago to require on-the-record hearings in regulatory schemes that, like § 408, empower agencies to ban potentially harmful products. Congress has done so because such regulatory power creates the risk that overbroad enforcement will result in bans of safe and useful products, to the detriment of manufacturers and users alike. Indeed, that is precisely what happened here: EPA effectively banned use of carbofuran, despite the fact that there has never been a documented incident of any person suffering adverse health effects from dietary exposure to carbofuran, either from food or drinking water. Pet. 7-8. As this very case illustrates, therefore, on-the-record hearings serve as an essential check against the danger of overbroad enforcement by ensuring that products are banned only after "a full and true disclosure of the facts." 5 U.S.C. § 556(d).

By deferring to an agency's decision to free itself of an essential check on its power, the D.C. Circuit effectively overrode Congress's judgment and the careful balance it struck. In 1954, Congress responded to concerns about the burdens of using formal rulemaking to set tolerances by adopting a hybrid, two-stage scheme: EPA may use informal rulemaking to develop or revoke a proposed tolerance, but on-the-record hearings are required if an affected party objects and raises material issues of disputed fact. EPA and the D.C. Circuit evidently believe that this scheme is inefficient, and that the results of the informal rulemaking stage should not even be questioned unless EPA acts arbitrarily and

capriciously in refusing to conduct a hearing. Indeed, in addition to deferring to EPA's hearing denial decision, the D.C. Circuit also blessed the agency's (illogical) rules that hearing requests can neither "recycle" issues from the informal rulemaking stage nor present issues that were not raised during that stage. Collectively, these principles convert Congress's two-stage hybrid scheme into something entirely different—informal rulemaking, with an extremely limited right to "administrative rehearing."

Review is thus warranted not only because the decision below conflicts with the decision of this Court and decisions by other courts of appeals, but because it raises a fundamentally important issue of administrative law. Congress has used this same two-stage, hybrid scheme in several statutes empowering agencies to ban products, and the vast majority of agency decisions are subject to review in the D.C. Circuit. Accordingly, this Court should, as it has several times in the past, grant certiorari to correct a fundamental error in administrative law by the highly influential D.C. Circuit.

## BACKGROUND

We will not repeat here the statutory scheme under which this case arises, the proceedings before EPA, or the decision below, all of which are ably presented in the petition. Instead, because the central flaw in the decision below was the D.C. Circuit's extension of inapposite deference principles to an agency's decision to dispense with a statutorily-required on-the-record hearing, we highlight at the outset the essential differences between informal and formal rulemaking. We then discuss the origins and rationale behind the on-the-hearing requirement of § 408 of the FFDCA, as well as the development of

administrative summary judgment procedures, including the procedure governing proceedings to establish pesticide tolerances. A full understanding of this background makes clear the glaring errors in the decision below.

### A. Formal Versus Informal Rulemaking.

Informal rulemaking is accomplished through the notice and comment process set forth in § 553 of the Administrative Procedure Act (APA). Agencies conducting informal rulemakings need not hold oral hearings at all. *Vt. Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 547 (1978). Instead, "[a]bsent constitutional constraints or extremely compelling circumstances," they are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 543 (internal quotations omitted). Moreover, absent an explicit directive in the agency's organic statute, the factual predicates for rules adopted through informal rulemaking are reviewed under the arbitrary and capricious standard, see 5 U.S.C. § 706(2)(A), which is "more lenient" than the "substantial evidence" standard. *Am. Paper Inst., Inc.* v. *Am. Electric Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983).

Where a statute mandates formal rulemaking, "the agency must conduct an oral evidentiary hearing that is closely analogous to the oral evidentiary hearing that takes place in judicial adjudications of disputes between individuals." Pierce, Jr., *Administrative Law Treatise* § 7.1, at 412 (4th ed. 2002). This trial-like procedure affords affected parties the right to an "impartial" fact-finder, as well as the right to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the

facts." 5 U.S.C. § 556(b)&(d). The findings underlying rules adopted through formal rulemaking are subject to the "substantial evidence" standard of review, *id.* § 706(2)(E), not merely the "more lenient" arbitrary and capricious standard.

As a result of this Court's decision in *Florida East Coast*, the more protective requirements of formal rulemaking are limited to those statutory schemes that require rules to be made "'on the record after opportunity for an agency hearing,'" or use "other statutory language having the same meaning." 410 U.S. at 237-38. Absent such language, agencies are free to use informal notice-and-comment rulemaking, and this Court has rebuffed lower court efforts to mandate additional procedures for informal rulemaking. *Vt. Yankee*, 435 U.S. at 543-48. The Court made clear in *Florida East Coast*, however, that neither courts nor agencies may dispense with formal rulemaking procedures when Congress clearly requires them. *Fla. E. Coast*, 410 U.S. at 238 (citing § 701(e) of the FFDCA as an example of a statute that mandates formal rulemaking).

### B. Section 408's On-The-Record Hearing Requirement.

In 1938, Congress enacted a statutory scheme to establish or revoke tolerances for pesticides found on foods. See FFDCA, ch. 675, § 406, 52 Stat. 1040, 1049 (1938). Congress required the Secretary of Agriculture to establish by regulation tolerances limiting the quantity of pesticides to a level safe for human consumption. *Id.* § 406(a), 52 Stat. at 1049. Such regulations were to be promulgated under § 701(e) of the Act, which provided that the Secretary "shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation." *Id.* § 701(e), 52 Stat. at 1055. Congress provided that "any interested

person may be heard" at the hearing, and that the Secretary shall base "his order only on substantial evidence of record at the hearing." *Id.*

The requirement of an on-the-record hearing was central to the law. A House Report states that if the Secretary's order establishing or revoking a tolerance under the FFDCA "is to be valid, the Government must have placed in the record at the hearing its evidence in support of the action taken and thereby afford opportunity for persons affected to controvert viva voce the Government's evidence." H.R. Rep. No. 75-2139, at 10 (1938). Citing this Court's then-recent decision in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), which addressed the critical role of hearings in preventing arbitrary government action, the Report continued: "it is essential to such a hearing that all the evidence on which the administrative officer acts be disclosed at the hearing and that the right to controvert viva voce be accorded." H.R. Rep. No. 75-2139, at 10; see also H.R. Rep. No. 75-2716, at 25 (1938) (Conf. Rep.) ("Secretary must base an order only on substantial evidence of record"). As then-Judge Kennedy noted, the drafters of § 701(e) considered public hearings "an essential procedure, and ... they intended the broad grant of power given to the administrative body by the statute to be checked by judicial review based only on the record compiled at the public hearings." *Pactra Indus., Inc.* v. *Consumer Prod. Safety Comm'n*, 555 F.2d 677, 682 (9th Cir. 1977).

Ultimately, the requirement that all tolerances be established through formal rulemaking proved burdensome to all concerned. See S. Rep. No. 83-1635 (1954), *reprinted in* 1954 U.S.C.A.A.N. 2626, 2627 (noting costs "to Government, to industry, [and] to agricultural organizations" of setting tolerances for

vegetables and fruits). In 1954, Congress responded by enacting a new two-tiered regulatory scheme.

Under the first tier, a proposed tolerance is developed through "informal proceedings rather than the formal public hearing type of proceedings." *Id.* at 2629. The Secretary of Health, Education, and Welfare, who had inherited responsibility for establishing tolerances,[2] would issue the tolerance within a specified time after giving notice of the proposal. FFDCA, ch. 559, § 408(d)(1)-(2), (e), 68 Stat. 511, 512-13, 514 (1954) (enacting 21 U.S.C. § 346a (1954)). Within a specified time thereafter, any party who submitted a petition for registration of a tolerance could request the tolerance be reviewed by a scientific advisory committee. *Id.* § 408(d)(2), (e), 68 Stat. at 512-13, 514. The committee had deadlines for issuing a report, and the Secretary then had 30 days to issue a final order. *Id.* § 408(d)(3), (e), 68 Stat. at 513, 514. The resulting regulation was "effective upon publication." *Id.* § 408(d)(4), (e), 68 Stat. at 513, 514.

While streamlining the process for initial tolerance determinations, however, Congress preserved affected parties' rights to an on-the-record hearing. Any person "adversely affected by a [tolerance] regulation" could file an objection and request a hearing. *Id.* § 408(d)(5), 68 Stat. at 513. In response,

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[2] The functions of the Food and Drug Administration were transferred from the Department of Agriculture to the Federal Security Agency, *see* Reorganization Plan No. IV of 1940, 5 Fed.Reg. 2421, § 12, at 2444 (Jun. 29, 1940), and then to the Department of Health, Education, and Welfare, *see* Reorganization Plan No. 1 of 1953, 18 Fed.Reg. 2053, § 5, at 2053 (Apr. 11, 1953). They were later transferred to EPA. Reorganization Plan No. 3 of 1970, 35 Fed.Reg. 15623, § 2(a)(4), at 15624 (Oct. 6, 1970).

the Secretary was required to "hold [a] public hearing for the purpose of receiving evidence relative and material to the issues raised by such objections." *Id.* After the hearing, the Secretary had to "act upon such objections" and issue a regulation "based only on substantial evidence of record at such hearing." *Id.* at 513-14. Thus, Congress reduced the number of on-the-record hearings by "limiting such hearings to issues which may remain in dispute at the conclusion of the informal proceedings." S. Rep. No. 83-1635, *reprinted in* 1954 U.S.C.A.A.N. at 2629-30. But, "[w]here the informal procedures do not produce a satisfactory tolerance or exemption the rights of all concerned to a full and fair hearing on the disputed issues [was] preserved." *Id.* at 2630; see also *id.* at 2634 (formal rulemaking required "on those parts of tolerance or exemption regulations to which objection is made").[3]

### C. The Origins Of EPA's Summary Judgment Procedure.

a. In 1970, as a way of ameliorating chronic administrative backlogs, the Administrative Conference of the United States proposed use of summary-judgment procedures in "'adjudicatory or rulemaking proceeding[s] required by statute to be determined on the record after opportunity for agency hearing.'" Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 Harv. L. Rev. 612, 628 (1971) (quoting Admin. Conference of the U.S., *Recommendation 20: Summary Decision in Agency Adjudication* (adopted June 2-3, 1970)). The recommendation was modeled on Federal Rule of

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[3] Two years later, Congress adopted a very similar two-tier scheme for all regulations issued under § 701(e). *See* Ch. 861, sec. 2, § 701(e), 70 Stat. 919, 919 (1956).

Civil Procedure 56 and borrowed its operative standard virtually verbatim. See *id.* (agency may grant summary decision "'if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact'") (quoting *Recommendation 20*).

A number of agencies initially objected to this proposal on the ground that the procedure would abridge statutory rights to hearings. *Id.* at 616. The proposal's drafters—Gellhorn and Robinson—responded to this and similar objections by repeatedly stressing that "[t]he proposed rule, like Rule 56, would not displace full hearings where basic facts are in dispute." *Id.* at 618; see also *id.* at 616 (under the governing standard of Rule 56, "summary judgment is granted only when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose").

b. As the Administrative Conference was formulating this proposal, FDA adopted a summary judgment procedure for on-the-record proceedings mandated under 1962 amendments to the FFDCA. Under these amendments, FDA was authorized to withdraw pre-1962 drug approvals if it found, after notice and an opportunity for a hearing, that there was "a lack of substantial evidence" of a drug's effectiveness. FDA issued regulations that specified the types of scientific studies required to establish effectiveness, and authorized the denial of a hearing when it "clearly appears ... from the reasons and factual analysis in [a] request for [a] hearing that there is *no genuine and substantial issue of fact* which precludes" withdrawal of the prior approval. See 35 Fed.Reg. 7250, 7252 (May 8, 1970) (emphasis added). See also *id.* at 7251 (noting that this

regulation was "an adaptation of the summary judgment procedures of the U.S. District Courts"). This Court upheld this summary judgment procedure and standard in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

In 1975, FDA proposed the summary judgment standard that would later serve as the model for the standard at issue in this case. Citing legal commentary on and discussion of, *inter alia*, the Administrative Conference proposal,[4] and explaining that it had "carefully considered all of the comments and suggestions made in ... these reports and discussions," 40 Fed.Reg. 22950, 22966 (May 27, 1975), FDA proposed a summary judgment standard for public hearings required under § 701(e) of the FFDCA. Under this standard, an on-the-record hearing was required if a requester showed:

> (1) that "[t]here is a genuine and substantial issue of material fact for resolution at a hearing";
>
> (2) that this "factual issue is capable of being resolved by available and specifically identified reliable evidence";
>
> (3) that this evidence, "if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by" the requester; and
>
> (4) that such a resolution "is adequate to justify the action requested."

*Id.* at 23001. FDA explained that, under this standard, "a hearing will be denied *only* where there

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[4] *See* 40 Fed.Reg. 22950, 22966 (May 27, 1975) (citing Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 Tex. L. Rev. 1132, 1183 & n.156 (1972), which discussed the Administrative Conference proposal).

is *no* relevant factual issue in dispute." *Id.* at 22968 (emphases added).

In response to comments, FDA again stated that a requester "must show only that there exist factual issues whose resolution is material to the outcome of the proceeding." 41 Fed.Reg. 51706, 51708 (Nov. 23, 1976). In addition, it stressed that the:

> [e]valuation of an objection or request for hearing ... *does not involve determining the weight and credibility of relevant evidence*; it involves determining whether there are factual issues to be resolved at a hearing. The regulation makes clear that establishing the validity of the data and information identified in an objection or request for hearing *is the function of the hearing.*

*Id.* at 51708 (emphases added). See also *id.* at 51709-10 (in ruling upon a request, agency would not "attempt to determine whether the evidence identified is credible or sufficient," nor will it "evaluate the probative value of the evidence identified in the objection"). Finally, FDA explained that the requirement of identifying available evidence in support of an objection was "not intended to limit evidence at the hearing to that identified in the objection." *Id.* at 51707. See also *id.* at 51709 ("additional relevant and probative evidence may be introduced at the hearing.").

c. In 1988, EPA adopted the summary judgment regulations applied in this case. EPA explained that these regulations were, "[t]o a very large extent, ... based on FDA regulations" promulgated in 1975. 53 Fed.Reg. 41126, 41129 (Oct. 19, 1988). EPA stated that, "[t]o the extent that the language in the regulations now proposed ... is the same as or

substantively similar to FDA regulations, EPA relies on FDA's explanations in support of this proposal and refers readers to them." *Id.* (citing Federal Register entries discussed above). And, EPA explained, the "rules for deciding whether to hold a hearing [under § 408] are substantially similar to the FDA rules." *Id.* See also App. 82a-83a (same).

Finally, in 1996, Congress amended the FFDCA and FIFRA in order to "establish a single regulatory framework for both raw and processed foods." H.R. Rep. No. 104-669(I), at 59 (1996). As part of this overhaul, Congress amended § 408 to provide that, in response to objections to a tolerance or revocation, EPA

> shall, upon the initiative of the Administrator or upon the request of an interested person and after due notice, hold a public evidentiary hearing if and to the extent the Administrator determines that such public hearing is necessary to receive factual evidence relevant to material issues of fact raised by the objections.

21 U.S.C. § 346a(g)(2)(B). This amendment thus codified the summary judgment standard EPA had adopted 18 years earlier. Indeed, following the 1996 amendments, EPA maintained the same summary judgment regulations that it had promulgated in 1988.

## REASONS FOR GRANTING THE PETITION

In the decision below, the D.C. Circuit did not simply reach an erroneous result through the application of settled rules to a unique set of facts. Instead, the lower court reviewed EPA's decision in this case under the *wrong* legal standard. This fundamental error warrants review by this Court.

## I. THE D.C. CIRCUIT IMPROPERLY DEFERRED TO EPA'S VIEW OF WHETHER CONGRESS MANDATED A HEARING IN THIS CASE.

### A. Deferring To Agency Hearing Denials Conflicts With This Court's Decision In *Hynson*.

The D.C. Circuit's decision to accord substantial deference to EPA's decision to dispense with an on-the-record hearing requirement conflicts with this Court's decision in *Hynson*. As noted, in 1970 FDA adopted a summary judgment standard for revocation of pre-1962 drug approvals. Although this Court upheld the regulation, it affirmed a Fourth Circuit decision rejecting one of the agency's first applications of that standard.

Critically, this Court noted that agency findings in support of a hearing denial were *not* subject to review under the APA's deferential "substantial evidence" test. That test, the Court explained, applies after an agency has *conducted* an on-the-record hearing under §§ 556 and 557 of the APA, not where the issue on appeal "involves the initial agency determination whether a hearing is required by statute." 412 U.S. at 623 n.19. Instead, in reviewing a hearing denial, courts must determine whether the agency's "findings accurately reflect the [evidence submitted in support of a hearing request] and if they do, whether the deficiencies [the agency] finds conclusively render the study inadequate" under the relevant regulatory standards. *Id.* at 622.

This is plainly not a highly deferential method of review. Rather than defer to an agency's findings, courts must ensure that the agency "accurately" evaluated an objector's evidence to determine

whether the agency has properly concluded "that the application cannot succeed," *id.* at 621, based on the evidence proffered. This standard of review, which is akin to that used to assess whether a district court properly entered summary judgment,[5] ensures that the purpose of an on-the-record hearing is not thwarted.

In the decision below, the D.C. Circuit declined to undertake the review that *Hynson* requires. Rather than determine whether EPA accurately evaluated the evidence proffered for a hearing, the lower court refused to substitute its judgment for that of the agency. App. 7a. This deferential, "hands-off" approach cannot be reconciled with the judicial review this Court required in conjunction with its decision to uphold agency use of summary judgment procedures. The decision below thus warrants review for this reason alone.

### B. According Deference To A Hearing Denial Contravenes Congress's Purpose In Requiring On-The-Record Hearings.

The decision in this case should also be reviewed because it thwarts the very purpose of statutorily-mandated on-the-record hearings. Congress mandated such a hearing in § 408 and in other statutes to serve as a restraint on agency power and to ensure that products are banned only after a full a fair disclosure of all relevant facts. Given these purposes, agencies are plainly not entitled to

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[5] This standard is also consistent with the Court's earlier decisions in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) and *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39-45 (1964). There, the Court upheld agency decisions to issue, through informal rulemaking, bright-line qualification rules and to deny hearings to those who manifestly could not satisfy those rules.

deference—let alone substantial deference—when they decide to dispense with these restraints.

As § 408's history makes clear, the purpose of the on-the-record hearing requirement is to protect persons affected by agency regulation. In authorizing the establishment and revocation of tolerances, Congress deemed it "essential" "that all the evidence on which the administrative officer acts be disclosed at the hearing and that the right to controvert viva voce be accorded." H.R. Rep. No. 75-2139, at 10. Public hearings followed by judicial review were thus designed as an "essential" "check[]" on "the broad grant of power given to the administrative body by the statute." *Pactra Indus.*, 555 F.2d at 682.

This same understanding animates the APA, which was enacted eight years after Congress first authorized the setting or revocation of tolerances through formal rulemaking. Section 553 provides that "[w]hen rules are ... to be made on the record after an opportunity for an agency hearing"—the requirement set forth in § 701(e) of the FFDCA in 1938—then "sections 556 and 557 of this title apply." 5 U.S.C. § 553. These latter provisions mandate use of an "impartial" presiding officer, and confer the right to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required *for a full and true disclosure of the facts*." *Id.* § 556(b)&(d) (emphasis added). Indeed, shortly after Congress carried forward § 701(e)'s hearing requirement in the two-stage rulemaking process it adopted for tolerances in 1954, this Court described the APA's hearing standards as "essential for wise and just application of the authority of administrative boards and agencies." *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202 (1956). See also *Pactra Indus.*, 555

F.2d at 685 (formal rulemaking mandated by § 701(e) of the FFDCA and the APA "impose[s] a discipline on the agency's decision-making process," fosters "a better understanding of the problem at hand," and results in "a more refined and precise statement of agency policy").

It simply makes no sense to defer to an agency's decision to dispense with an on-the-record hearing requirement that is supposed to serve as an essential *check* on that agency's exercise of discretion. Deference is appropriate when an agency exercises discretion that Congress has conferred, not when it decides that limits Congress has placed on its discretion do not apply. The D.C. Circuit's application of deference in this case, therefore, is utterly antithetical to Congress's purpose in creating the hearing requirement.

### C. Deferring To Agency Hearing Denials Is Inconsistent With The Justification For Administrative Summary Judgment.

Deferring to an agency hearing denial is also antithetical to the very premise of summary judgment and the justifications for agency use of that device. A trial court's decision to dispense with a trial is not subject to deferential "abuse of discretion" review. This is because a litigant's right to a trial is not a matter of judicial discretion but is instead mandated by a provision in the organic charter that creates Article III courts. The same logic applies here. Where an agency's organic statute mandates an on-the-record hearing, an affected person's right to that hearing is not a matter of agency discretion. Thus, to ensure that an agency's grant of summary judgment does not abridge a right conferred by the decision-maker's organic charter, that decision

likewise should not be reviewed under a highly deferential standard.

Proponents of administrative summary judgment recognized and repeatedly invoked this very parallel. The drafters of the Administrative Conference recommendation explained that, "[j]ust as summary judgment is not in conflict with the right to a trial by jury," administrative summary judgment "honors the right to" an on-the-record hearing. Gellhorn & Robinson, *supra*, at 616. This was so, they explained, because "[t]he proposed rule, like Rule 56, would not displace full hearings where basic facts are in dispute." *Id.* at 618. Similarly, in proposing its summary judgment standard for revocation of pre-1962 drug approvals, FDA explained that the standard was "an adaptation of the summary judgment procedures of the U.S. District Courts." 35 Fed.Reg. at 7251. And, when FDA later adopted the summary judgment standard for regulations issued under § 701(e), it relied on the Administrative Conference's proposed rule and accompanying commentary, 40 Fed.Reg. at 22966, and repeatedly explained that, under this standard, "a hearing will be denied *only* where there is *no* relevant factual issue in dispute," *id.* at 22968 (emphases added). See also 41 Fed.Reg. at 51708. EPA, in turn, adopted this same standard in its regulations, as well as FDA's rationale and explanation for that standard. 53 Fed.Reg. at 41129.

Significantly, while proponents of administrative summary judgment made clear that hearings would not be required on issues of policy (where agencies

enjoy discretion),[6] they nowhere claimed that agencies could exercise discretion in deciding whether genuine and substantial issues of fact were in dispute. To the contrary, FDA repeatedly stated that its summary judgment regulation under § 701(e) was appropriate because the agency's "[e]valuation of an objection or request for hearing ... *does not involve determining the weight and credibility of relevant evidence.*" 41 Fed.Reg. at 51708 (emphasis added). Accordingly, FDA assured the public that it would "not, in ruling upon a request [for a hearing], attempt to determine whether the evidence identified is credible or sufficient," or "evaluate the probative value of the evidence identified in the objection." *Id.* at 51709-10.

The D.C. Circuit's decision reflects no appreciation for this history, and could not be more inconsistent with it. Under the lower court's deferential standard of review, "'differences in the weight or credence given to particular scientific studies ... are insufficient'" grounds for disturbing a hearing denial, and courts reviewing such a denial are not to "'substitute [their] judgment on highly technical and factual matters for that of the agency.'" App. 7a. Yet the agency that promulgated the standard stressed that it had no discretion to weigh or evaluate evidence in deciding whether to hold a hearing, because "establishing the validity of the data and information identified in an objection or request for hearing *is the function of the hearing.*" 41 Fed.Reg. at 51708 (emphasis added).

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[6] *See, e.g.*, 40 Fed.Reg. at 22968 ("[i]f there are only policy or legal issues involved, rather than factual issues, there is no requirement that a hearing be held").

FDA's representations and disclaimers, which EPA has embraced as its own, are consistent with judicial practice under Rule 56. There, courts likewise cannot weigh or evaluate the relative strength of evidence in deciding whether to grant summary judgment and must instead draw all inferences in favor of a litigant opposing such a grant. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986). Just as a district court's non-discretionary decision to grant summary judgment is not properly reviewed under a deferential abuse-of-discretion standard, see *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992), so too an agency's equally non-discretionary decision to dispense with a statutorily required on-the-record hearing is not properly reviewed under a deferential arbitrary and capricious standard. Simply put, in deciding whether to hold a hearing, an agency cannot weigh or evaluate evidence. And thus, no deference is owed to the "weight or credence" an agency gives to particular evidence or any judgments it reaches on "factual matters" in the course of deciding not to hold a hearing.

## II. THE ERRONEOUS DECISION BELOW RAISES AN IMPORTANT ISSUE OF ADMINISTRATIVE LAW.

The conflict the D.C. Circuit's decision creates with *Hynson*, as well as with decisions by several courts of appeals, see Pet. at 23-26, justifies review by this Court. Even absent conflicts, however, this Court has reviewed decisions raising important questions of administrative law. See, *e.g.*, *Vt. Yankee*, 435 U.S. at 525, 536 n.14 (granting review of D.C. Circuit decisions out of "concern that they had seriously misread or misapplied ... statutory and decisional law" and because "the vast majority of challenges to

administrative agency action are brought" in that circuit).[7] It should do the same here to provide a necessary correction to administrative law in the D.C. Circuit.

As a result of this Court's "revolutionary holding in *Florida East Coast*," formal rulemaking is now restricted to statutes that clearly require on-the-record hearings. See 1 Pierce, *supra*, § 7.2, at 420. And this Court has repudiated efforts to mandate additional procedures for informal rulemaking. *Vt. Yankee*, 435 U.S. at 543-48. Yet, despite the well-documented burdens of formal rulemaking, see 1 Pierce, *supra*, § 7.2, at 420, Congress has continued to require on-the-record hearings in various regulatory schemes, including this one. Such proceedings have been made more efficient by this Court's approval of administrative summary judgment, *Hynson*, 412 U.S. at 618-22, and by the streamlining achieved through the two-tier scheme Congress adopted in this and other regulatory schemes. See *Pactra Indus.*, 555 F.2d at 683-85 (discussing similar two-stage process for banning of hazardous substances). The decision below, however, plainly swings the pendulum too far in favor of agency convenience and efficiency, at the expense of important interests that Congress sought to protect.

It may well appear to the D.C. Circuit and EPA that revoking tolerances is an exercise in weighing "legislative" facts, and that the results of the informal rulemaking stage should be disturbed only where

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[7] *See also Fla. E. Coast*, 410 U.S. at 236 & n.6 (noting probable jurisdiction despite unanimity of lower courts, fact that lower courts had not had a chance to address intervening Court authority, and government's failure to press the issue in proceedings below).

EPA fails to give "adequate consideration to all relevant evidence in the record." App. 7a. But this is manifestly not the scheme Congress adopted. Congress viewed public hearings followed by judicial review as an "essential" "check[]" on "the broad grant of power given to the administrative body by the statute." *Pactra Indus.*, 555 F.2d at 682. And, in response to evidence that use of such hearings to establish or revoke tolerances could be unduly burdensome, it *retained* the requirement with respect to "those parts of tolerance or exemption regulations to which objection is made." S. Rep. No. 83-1635, *reprinted in* 1954 U.S.C.A.A.N. at 2634.

Congress has repeatedly recognized that the power to ban pesticides, ineffective drugs, or hazardous substances carries with it the risk that overbroad enforcement will result in the ban of safe and useful products. Such bans, in turn, can harm legitimate reliance and other interests of affected parties. As Justice Powell observed with respect to FDA's authority to revoke pre-1962 drug approvals for ineffective drugs, "[i]n an understandable zeal to remove [such products], an administrative agency must not overlook both the interest of the public and the right of the proprietor in protecting the drugs that are useful." *Hynson*, 412 U.S. at 639 n.2 (Powell, J., concurring in part).

The same is true here. The laudable desire to eliminate harmful pesticide residues can (and in this case did) lead EPA to ban safe and useful products. As noted, there has never been a documented incident of adverse health effects from dietary exposure to carbofuran, even during the 1980s, when annual usage was 50 times what it is today. See Pet. at 7-8; App. 344a-45a. Banning useful products like this is detrimental not only to manufacturers, but to

the growers who rely on those products and have invested time and money in the unique equipment, protective gear, and training needed to use those products. On-the-record hearings prevent precisely these types of harms, by ensuring the "full and true disclosure of the facts," 5 U.S.C. § 556(d), that fosters "a better understanding of the problem at hand," and "a more refined and precise statement of agency policy." *Pactra Indus.*, 555 F.2d at 685. Because the decision below has effectively gutted this Congressionally-mandated protection in § 408, and threatens to do the same to similar statutory schemes that empower agencies to ban products, this Court should review and reverse the decision below.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 2011

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